

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

Nakia Ghassed, et al.,

Case No. 2:20-cv-01711-GMN-BNW

**Plaintiff,**

## **REPORT AND RECOMMENDATION**

V.

## Smith's Food and Drug Centers, Inc.

Defendant.

10 Before the Court is Plaintiffs' motion to amend the complaint and remand the case to state  
11 court. ECF No. 20. Defendants opposed. ECF No. 21. Plaintiffs replied. ECF No. 23.  
12 For the reasons discussed below, the Court will recommend that the motion be denied.

## I. Background

#### **A. Procedural Posture**

Plaintiffs initiated this action by filing a complaint in state court on May 29, 2020. ECF No. 1-1. Plaintiff Nakia Ghassedi alleged that on November 28, 2019, she was shopping at Smith's and was struck by a cart overloaded with boxes being handled by one of its employees. *Id.* She alleges that, as a result, she suffered injuries. *Id.* at 3. Accordingly, Plaintiffs brought a negligence action against Smith's and several Doe defendants. *Id.* at 2-16.

Defendant removed this case based on diversity jurisdiction on September 16, 2020. ECF No. 1.

## B. Plaintiffs' Motion<sup>1</sup>

Plaintiffs move to amend their complaint to add Courtney Clark as a defendant. Plaintiffs allege Clark was handling the cart that ultimately injured Mrs. Ghassedi. ECF No. 20 at 3-4.

<sup>1</sup> The Court notes that the parties made several arguments not discussed below. The Court reviewed these arguments and determined that they do not warrant discussion, as they do not affect the outcome of the motions before the Court.

1 Plaintiffs cite to 28 U.S.C. § 1447(e) as the governing statute for purposes of this motion  
 2 and ask the court to consider the factors enumerated in *Boon v. Allstate Ins. Co.*, 229 F.Supp.2d  
 3 1016, 1020 (C.D. Cal. 2002). *Id.* at 4. Relevant to the *Boone* factors, Plaintiffs first explain that  
 4 Clark is a required party under Rule 19(a). *Id.* at 5. They rely heavily on *Lieberman v. Wal-Mart*  
 5 *Stores, Inc.*, 2013 WL 596098 (D. Nev. 2013), for the proposition that Clark, who could be held  
 6 independently responsible for the alleged tortious conduct, is a necessary defendant under Fed. R.  
 7 Civ. P. 19(a). *Id.* Plaintiffs also argue that denial of this request would require Plaintiffs to initiate  
 8 a separate action against Clark in state court. *Id.* at 8. Although the statute of limitations has not  
 9 run, Plaintiffs argue that having to commence a separate action would be prejudicial. *Id.* They  
 10 also argue that there is no delay in bringing this motion, as it was filed within the allotted  
 11 deadline. *Id.* at 6. Lastly, they argue the strengths of their case and that there is no suspect reason  
 12 for this request. *Id.* at 7-8. Plaintiffs conclude that they should be permitted to amend their  
 13 complaint to add Clark. *Id.* at 9. Plaintiffs further argue that once they amend the complaint, the  
 14 Court no longer has diversity jurisdiction over this case. *Id.* Accordingly, Plaintiffs argue that  
 15 remand is required. *Id.*

16       **C. Smith's Opposition**

17       Smith's asks the Court to follow the same authorities cited by Plaintiffs but opposes the  
 18 request. ECF No. 21. Smith's argues that the Court has considerable discretion to deny Plaintiffs'  
 19 motion to amend and should do so after applying the *Boone* factors. *Id.* at 5-11. First, Smith's  
 20 argues that Plaintiffs will not be prejudiced by Clark's absence, as he is not a necessary party. *Id.*  
 21 at 7-8. Smith's also argues that there is no reason to name Clark as a defendant because Smith's  
 22 will be vicariously liable for any of his allegedly negligent acts and (unlike Clark) has the  
 23 resources to pay Plaintiffs any damages award. *Id.* at 8-9. Given these facts, Smith's argues that it  
 24 appears Plaintiffs' sole motive in naming Clark is to destroy diversity. *Id.*

25       Moreover, Smith's argues that Plaintiffs have unduly delayed in bringing this motion. *Id.*  
 26 at 5-7. Smith's alleges Plaintiffs waited until seven months after removal, six months after  
 27 discovery began, and four days before the deadline to amend to seek amendment. *Id.* Smith's also  
 28

1 argues that Plaintiff has not taken a single deposition and waited to serve written discovery until  
 2 March 2021. Thus, Smith's argues that the request is untimely and should be denied. *Id.* at 9.

3 **D. Plaintiffs' Reply**

4 Plaintiffs' reply focuses solely on whether Clark is a necessary party and reiterates the  
 5 importance of the *Lieberman* case to this Court's determination. ECF No. 23 at 4-5. Plaintiffs also  
 6 point out that while Smith's response *stipulates* and *admits* that Clark was working in the course  
 7 of scope of his employment, such statements have no legal effect. *Id.* at 5. In fact, they attached  
 8 Smith's response to a Request for Admission which, according to Plaintiffs, demonstrates that  
 9 Smith's is not truly willing to stipulate to that fact. *Id.*

10 **II. Analysis**

11 “There is a split in authorities, unresolved by the Ninth Circuit, on what standard governs  
 12 the Court’s decision whether to permit joinder of” defendants that would destroy diversity, Rule  
 13 15 or 28 U.S.C. § 1447(e). *McGrath v. Home Depot USA, Inc.*, 298 F.R.D. 601, 606 (S.D. Cal.  
 14 2014); *see also Magana v. Archer Daniels Midland Co.*, No. 120CV00578NONESKO, 2021 WL  
 15 1375466, at \*1 (E.D. Cal. Apr. 12, 2021) (acknowledging that the Ninth Circuit has yet to resolve  
 16 what standard governs this situation); *Armstrong v. FCA US LLC*, No. 119CV01275DADSAB,  
 17 2020 WL 6559232, at \*3, n.3 (E.D. Cal. Nov. 9, 2020) (recognizing split).

18 Under Rule 15, a party may amend its pleading once “as a matter of course” within  
 19 twenty-one days of serving it, or within twenty-one days after service of a responsive pleading or  
 20 motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, “a party may amend its  
 21 pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P.  
 22 15(a)(2). “The court should freely give leave when justice so requires.” *Id.* “The standard for  
 23 granting leave to amend is generous.” *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th  
 24 Cir. 2011). And “the nonmovant bears the burden of showing why amendment should not be  
 25 granted.” *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 666 (Fed. Cir. 1986).

26 “The court considers five factors [under Rule 15] in assessing the propriety of leave to  
 27 amend—bad faith, undue delay, prejudice to the opposing party, futility of amendment, and  
 28 whether the plaintiff has previously amended the complaint.” *Corinthian Colls.*, 655 F.3d at 995.

1 These factors, however, are not equally weighted. *United States v. Webb*, 655 F.2d 977, 980 (9th  
 2 Cir. 1981). Specifically, “delay alone[,] no matter how lengthy[,] is an insufficient ground for  
 3 denial of leave to amend.” *Id.*; *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th  
 4 Cir. 1987) (“[D]elay alone is not sufficient to justify the denial of a motion requesting leave  
 5 to amend.”). To deny a motion to amend based on delay, bad faith or prejudice must also exist.  
 6 *Webb*, 655 F.2d at 980.

7 Under 28 U.S.C. § 1447(e), “[i]f after removal the plaintiff seeks to join additional  
 8 defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder,  
 9 or permit joinder and remand the action to the State court.” “The language of § 1447(e) is  
 10 couched in permissive terms and it clearly gives the district court the discretion to deny joinder.”  
 11 *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998).

12 The Court agrees with the parties and believes that the proper analysis of a motion to  
 13 amend that would add defendants and destroy subject matter jurisdiction is under 28 U.S.C. §  
 14 1447(e). While district courts in the Ninth Circuit have gone both ways, the Ninth Circuit’s  
 15 decision in *Newcombe*, 157 F.3d at 691 suggests that the proper analysis is under Section 1447(e).  
 16 In *Newcombe*, after the case was removed, the plaintiff sought to add a defendant that would  
 17 destroy diversity. *See id.* The district court denied the motion and the Ninth Circuit affirmed. *See*  
 18 *id.* The Ninth Circuit cited Section 1447(e) (not Rule 15) and explained that

19 [t]he district court considered the potential prejudice to Newcombe, balanced the  
 20 equities, and determined that no injustice would occur. The district court, after  
 21 stating that it was aware of its discretion under § 1447(e), concluded that Cassidy  
 22 was not a crucial defendant in this case because Newcombe only sought (1) an  
 23 injunction, which could only be enforced against the other defendants, and (2)  
 24 money damages, which could be fully satisfied by the other defendants. In addition,  
 25 the district court concluded that Newcombe would not suffer undue prejudice due  
 26 to Cassidy’s absence as a party because he could subpoena Cassidy to testify at  
 27 trial, and if he so chose, he could still proceed separately against Cassidy in state  
 28 court. We agree with these conclusions and therefore conclude that the district court  
 did not abuse its discretion in denying Newcombe’s motion to remand.

26 *Id.*  
 27  
 28

1           In two unpublished decisions issued since *Newcombe*, the Ninth Circuit has continued to  
 2 apply Section 1447(e) in situations such as this (and not applied Rule 15). *See 3WL, LLC v.*  
 3 *Master Prot., LP*, 851 F. App'x 4, 7 (9th Cir. 2021) (applying Section 1447(e) and reasoning that  
 4 “[b]ecause ‘[t]he language of § 1447(e) is couched in permissive terms and it clearly gives the  
 5 district court the discretion to deny joinder,’ this court has upheld such denials where the district  
 6 court ‘considered the potential prejudice to [the plaintiff], balanced the equities, and determined  
 7 that no injustice would occur.’”) (citing *Newcombe*); *Kwasniewski v. Sanofi-Aventis U.S., LLC*,  
 8 637 F. App'x 405, 407 (9th Cir. 2016) (“Plaintiffs sought leave to amend the complaint . . . The  
 9 district court properly denied the motion because the proposed amendment sought to rejoin  
 10 diversity-destroying defendants under the analysis required by 28 U.S.C. § 1447(e.”).

11           The Court concludes that, based on *Newcombe*, it should consider the prejudice to the  
 12 Plaintiff, balance the equities, and determine whether injustice would occur. *See Newcombe*, 157  
 13 F.3d at 691; *3WL*, 851 F. App'x at 7 (“this court has upheld such denials where the district court  
 14 ‘considered the potential prejudice to [the plaintiff], balanced the equities, and determined that no  
 15 injustice would occur.’”) The Court acknowledges that district courts in the Ninth Circuit  
 16 sometimes apply various factors in evaluating motions to amend under Section 1447(e); however,  
 17 different courts apply different factors (or none at all). *See, e.g., Sanchez by & through Gomez v.*  
 18 *Target Corp., LLC*, No. 221CV00058KJDDJA, 2021 WL 952095, at \*1 (D. Nev. Mar. 12, 2021)  
 19 (applying six factors); *O’Leary v. Smith’s Food & Drug Centers, Inc.*, No., 2019 WL 1217296, at  
 20 \*1 (D. Nev. Feb. 25, 2019), *report and recommendation adopted*, No. 2:18-CV-2150-GMN-VCF,  
 21 2019 WL 1207931 (D. Nev. Mar. 14, 2019) (applying three factors); *Resendez v. Smith’s Food &*  
 22 *Drug Centers, Inc.*, No. 2:14-CV-00201-APG-NJK, 2015 WL 875300, at \*1 (D. Nev. Mar. 2,  
 23 2015) (applying four factors); *Glaster v. Dollar Tree Stores, Inc.*, No. 215CV00252MMDVCF,  
 24 2016 WL 128139, at \*2 (D. Nev. Jan. 12, 2016) (noting that “some district courts in the Ninth  
 25 Circuit have applied a multi-factor test to this analysis, assessing the motives behind seeking  
 26 joinder, and whether joinder would affect subject matter jurisdiction. Many of those factors,  
 27 however, appear to arise from Ninth Circuit case law that predates the 1988 enactment of  
 28 § 1447(e) in its current form.”). Accordingly, rather than relying on those authorities or the

1 district court case (*Boone*) the parties relied on, the Court follows the Ninth Circuit in *Newcombe*  
 2 and subsequent unpublished cases and will assess the prejudice to the Plaintiff, balance the  
 3 equities, and determine whether injustice would occur.

4 First, the Court considers the prejudice to Plaintiff if amendment is denied and determines  
 5 that Plaintiff will not be prejudiced. The Court has considered the *Lieberman* case and still finds  
 6 that Clark is not a necessary defendant. This is so for two reasons. First, Smith's admits that it  
 7 will be vicariously liable under the doctrine of respondeat superior for any alleged negligence of  
 8 Clark. The Court read the attached response to the Request for Admission and, given the wording  
 9 of the request, understands the position that Smith's took in responding the way it did.  
 10 Nevertheless, as an officer of the Court, Smith's counsel has already taken the position that  
 11 Smith's will assume any liability, as Clark was acting in the course and scope of his employment  
 12 at the time of the accident. ECF No. 21 at 3, 7-9. Should Smith's take a contrary position during  
 13 this litigation, it will have to answer to the Court because this decision relies on that  
 14 representation. Next, Smith's represents it, unlike Clark, has the resources to pay whatever  
 15 damages award Plaintiff might receive. *Id.* at 4.

16 Additionally, Plaintiffs would not suffer undue prejudice from Clark's absence as a party  
 17 because they could subpoena him to testify at trial. See *Newcombe*, 157 F.3d at 691. Finally, the  
 18 Court notes that Plaintiff could sue Clark separately in state court because the statute of  
 19 limitations has not run. See ECF No. 10 at 12.

20 Second, the Court balances the equities of allowing amendment versus denying  
 21 amendment. If the Court allowed amendment, Plaintiff may be able to sue Clark. This cuts  
 22 slightly in favor of allowing amendment. However, as previously discussed, Plaintiff would not  
 23 obtain any more complete relief from suing Clark, as he has no appreciable assets. This cuts  
 24 against allowing amendment.

25 Although not crucial to this decision, Plaintiffs also delayed in moving to amend, even  
 26 though they moved before the deadline. That is, the information Plaintiffs had when filing the  
 27 instant motion is the same information that was available to them when the case was removed.  
 28 And the Court agrees that Plaintiffs did not do much to ascertain the Clark's identity until well

1 into the discovery period. Given this delay, it seems unlikely that Plaintiffs truly desire to initiate  
2 an action against Clark in his individual capacity. Rather, it appears the only benefit to adding  
3 Clark would be to have the action remanded to state court.

4       Third, the Court determines there would be no injustice if Plaintiffs were not allowed to  
5 amend their complaint. As previously discussed, Clark is not a necessary defendant in this case,  
6 and Plaintiffs can obtain complete relief from Smith's.

The Court notes that Plaintiffs' amended complaint does not include Mr. Ghassedi. Smith's does not oppose his removal from the case in its response. As a result, the Court will grant this specific amendment as unopposed under LR 7-2(d). Nevertheless, the Court, in its discretion under 28 U.S.C. § 1447(e), recommends that Plaintiffs' motion to amend be denied in all other respects. In turn, as diversity will not be destroyed, remand is neither necessary nor appropriate. Accordingly, the Court also recommends that Plaintiffs' request to remand be denied.

## E. Conclusion and Recommendation

14           **IT IS THEREFORE RECOMMENDED** that Plaintiff's motion to amend (ECF No. 20)  
15       be **GRANTED** in part and **DENIED** in part consistent with this opinion.

## NOTICE

18        This report and recommendation is submitted to the United States district judge assigned  
19 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation  
20 may file a written objection supported by points and authorities within fourteen days of being  
21 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely  
22 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d  
23 1153, 1157 (9th Cir. 1991).

25 DATED: August 17, 2021

  
BRENDA WEKSLER  
UNITED STATES MAGISTRATE JUDGE